Supreme Court, U.S.
FILED
SEP 15 2006
OFFICE OF THE CLERK

No. 06-387

In The Supreme Court Of The United States

NATHANIEL PORTER, JR.; HEATHER L. WILLIAMS; PAMELA C. FRYE; DEMETRICE L. PENNIE; ALAN KEITH WALKER; MARK S. HUDSON; STEVIE HARRIS; THOMAS K. VEITHCH; MARCIA ROSE WALL; BETH ELLEN JACKSON; CHRISTOPHER S. HEFTLER; NATHAN FISHER,
Petitioners,

V.

WALTER S. RAY, JR.; BOBBY K. WHITWORTH; JIM WETHERINGTON; GARFIELD HAMMONS, JR.; BETTY ANN COOK; EUGENE P. WALKER; MILTON E. NIX, JR.; J. MICHAEL LIGHT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Ex Post Facto prohibit members of the Georgia parole agency from retroactively enforcing an unpublished ninety percent to serve policy foreclosing Petitioners and similarly situated inmates of any meaningful consideration for release on parole before serving de facto ninety percent of their sentences and retroactively substantially increasing their sentences to serve beyond their likely release on parole in accordance with the enacted parole laws in effect at the time of commission of their offenses after serving one-third of their judicial sentences and the months to serve calculated under statutorily mandated Parole Decision Guidelines?

2. Does the retroactive application of an unpublished ninety percent to serve policy by the Georgia parole agency that substantially extends sentences to serve beyond the enacted parole laws and parole decision guidelines without fair legal warning also violate Due Process?

3. Are extended sentences to serve a continuing constitutional violation beyond the likely release on parole under the enacted parole laws and the legislatively mandated Parole Decision Guidelines?

4.. Are Due Process and the Federal Rules of Civil Procedure violated when the Petitioners are denied discovery necessary to prove their case that is secreted exclusively in the files of the Georgia parole agency?

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The Opinion of the United States Court of Appeals for the Eleventh Circuit, June 21, 2006, affirming the granting of summary judgment for the Respondents is set forth in the Appendix at A-1. The Order of the United States District Court for the Northern District of Georgia, July 5, 2006 denying reconsideration of the granting summary judgment for the Respondents is set forth in the Appendix at A -18. The Order of the United States District Court for the Northern District of Georgia, April 25, 2006, granting Respondents' motion for summary judgment is set forth in the Appendix at A-25. The order of the United States District Court for the Northern District of Georgia, May 29, 2002, holding the retroactive application of the Georgia parole agency's unpublished ninety percent to serve policy extending sentences to serve in violation of Ex Post Facto protections of the United States Constitution is set forth in the Appendix at A-38.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on June 21, 2006. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I. SECTION 9. No…ex post facto law shall be passed.

ARTICLE I. SECTION 10. No State… shall pass any…ex post facto Law…

AMENDMENT V. No person shall be held to answer … nor be deprived of life, liberty, or property without due process of law;

AMENDMENT XIV. SECTION I. …nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

STATEMENT OF THE CASE

The sentences to serve of Petitioners ("Petitioners") have been retroactively substantially extended by the Georgia State Board of Pardons and Paroles ("Board") applying a de facto ninety percent to serve policy in violation of Ex Post Facto beyond the time that he should have been released on parole under the enacted parole laws and the legislatively mandated Parole Decision Guidelines in effect at the time of commission of his offense. The Peititioners have all been required to be incarcerated substantially longer than their sentences to serve under the parole laws and Parole Decision Guidelines in effect at the time of commission of their offenses and the admittedly unconstitutional retroactive increases in their punishment have been continued in subsequent "reconsiderations."

The statutory parole laws in Georgia provide for eligibility for parole after serving one-third of judicial sentences pursuant to O.C.G.A. § 42-9-45 (b) and the months to serve calculated according to the parole decision guidelines pursuant to mandate of O.C.G.A. § 42-9-40 (a). The statutorily parole laws provide for denial of release on an objective determination on an individual basis that an inmate's release on parole would not be compatible with the inmate's own welfare or the welfare of society pursuant to O.G.C.A. § 42-9-42 (c).

After a legislative attempt failed to enact a requirement that all violent offenders serve their entire judicial sentences, in order to satisfy the eighty-five percent of judicial sentences to serve requirement of the Violent Offenders Incarceration – Truth In Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq*. to qualify for federal grant funds to build new prisons, the Georgia Board adopted an unpublished resolution that all inmates in twenty violent and residential burglary offender categories must serve ninety percent of their judicial sentences. The sentencing

laws in Georgia provide for sentences which are substantially longer than most states sentencing laws and guidelines because the statutory parole laws contemplate that deserving inmates will be released after serving one-third of their judicial sentences or the months to serve calculated under the parole decision guidelines. Rather than reducing the sentencing periods as other states did in order to comply with the 85% requirement for funding pursuant to VIOTIS, Georgia went the other way and required that inmates in seven most serious violent offender categories serve mandatory sentences without parole, but when a similar legislative attempt failed to increase sentences to serve for other violent felonies, the Board adopted and retroactively implemented an unpublished "policy" that all offenders in twenty other violent offense and residential burglary categories must serve ninety percent of their judicial sentences before being practically eligible for release on parole.

This unpublished policy had an unpublished "effective date" of January 1, 1998, but the Board slavishly applied the ninety percent to serve policy retroactively to inmates including Petitioner whose offenses were prior to January 1, 1998 to practically foreclose any parole until the inmates in the listed categories had served ninety percent of their sentences.

On May 29, 2002 United States District Court Judge William C. O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*. United States District Court for the Northern District of Georgia, Civil No. 2:01-CV-068-WCO, held unconstitutional in violation of Ex Post Facto prohibitions the retroactive application to plaintiff Coleman Jackson of the unpublished policy of the Board which substantially extended Georgia inmates' sentences to serve to at least ninety percent of their judicial sentences. (A-60). Judge O'Kelley ordered the individual members of the Board (Respondents herein) to immediately consider the plaintiff

Coleman Jackson for parole without regard to the ninety percent to serve policy.. The Board did not appeal Judge O'Kelley's Order holding the retroactive application of the ninety percent to serve policy unconstitutional and the Board thereafter released Coleman Jackson on parole.

The staff of the Board automatically and slavishly applied the ninety percent to serve policy to 8,664 cases from January 1, 1998 through June 30, 2001 and except for 10 special prosecutorial deals, all inmates in the twenty categories were foreclosed from being considered for parole until they had served the ninety percent threshold. (Order of Judge O'Kelley, May 29, 2002, at A-44 and A-55). The representative of the Board testified that the updated number of inmates under the ninety percent to serve policy was at least 10,000 with only 18 being released on parole serving less than ninety percent and these were substantially all prosecutorial deals. (Sullivan Deposition, p 16).

As a result of Judge O'Kelley's holding the retroactive application of the ninety percent to serve policy unconstitutional, the members of the Board adopted a Resolution Amendment, dated September 9, 2002, acknowledging the illegality of the retroactive application of the ninety percent to serve policy and provided for reconsideration of parole for all inmates whose offenses were committed before January 1, 1998 who "shall be considered for parole under the Parole Decision Guidelines that do not include the ninety percent policy.

However, the Defendants as members of the Board did not reconsider Petitioners or any of the other similarly situated inmates under the Parole Decision Guidelines. In spite of the Respondent Board members committing to reconsider inmates under the Parole Decision Guidelines, they did not follow the Parole Decision Guidelines for the Petitioner or in a single case of similarly situated inmates The Respondents only gave lip service that they would

reconsider Petitioner Hall and similarly situated inmates for parole under the Parole Decision Guidelines. In no case did the Board follow the Parole Decision Guidelines or the statutory parole laws, only giving token adjustments of a few months, and continuing a de facto ninety percent to serve policy in order to avoid the exact mathematical ninety percent. The resulting reconsideration of Petitioners and other inmates in the Class were still substantially retroactively extended by an average 5.6 years beyond the parole decision guidelines and still averaged 79% of their judicial sentences in order to continue to satisfy the 85 % VOITIS requirement when averaged with the seven serious violent felony sentences legislatively requiring that 100 percent of judicial sentences be served. (O.C.G.A. § 17-10-6.1).

In the underlying case the District Court District denied granted the Respondent Board Members motion for summary judgment, April 25, 2006 (A-25) and denied Petitioners' motion for reconsideration, July 5, 2006 (A-18), on the grounds that there is no liberty interest in parole protected by the Due Process Clause in Georgia following, *Sultenfuss v. Snow*, 35 F. 3d 1494 (11th Cir. 1994) and that the Plaintiff had not demonstrated that the Board was retroactive extending his sentence to serve in violation of Ex Post Facto. Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the District Court June 21, 2005.

This Petition for Writ of Certiorari involves questions of exceptional constitutional importance of whether the Georgia Board should be constitutional allowed to retroactively substantially extend Petitioners' and similar situated inmates' sentences to serve following their unpublished de facto ninety percent to serve policy.

REASONS FOR GRANTING THE PETITION

The decision of the United States Court of Appeals for the Eleventh Circuit improperly avoided deciding an important federal question which should be decided by the United States Supreme Court as to whether by an unpublished policy a state parole agency can retroactively increase from the statutory one-third threshold and the legislatively mandated Parole Decisions Guidelines to practically foreclose release on parole until a substantially extended sentence of de facto ninety percent for consideration and release on parole of Petitioners and similarly situated inmates in twenty violent offender categories in violation of Ex Post Facto and Due Process protections of the United States Constitution.

The Eleventh Circuit's decision conflicts with decision of other United States Courts of Appeals as well as decisions of this United States Supreme Court. The Third Circuit in *Mickens-Thomas v. Vaughn*, 321 F. 3d 374 (3d Cir. 2003) recently held that a change in discretionary parole policies governing early release by the Pennsylvania Parole Board violated Ex Post Facto, reaffirming that "The presence of discretion does not displace the protections of the Ex Post Facto clause." Citing *Garner*, 529 U.S. at 353. 321 F. 3d 374, 386. The Third Circuit in *Mickens-Thomas* squarely ruled on the same issue in the instant case that a parole agency must rely on the parole laws in place at the time of commission of the petitioner's crime. The issues raised herein have broad application as to whether state parole agencies claiming "unfettered discretion" can constitutionally retroactively substantially increase inmates' sentences to serve beyond their likely sentences to serve for release on parole under the parole laws and guidelines in effect at the time of commission of their offenses.

Eleventh Circuit has continued a recent line of cases of employing various strained procedural bars to avoid

reaching the merits of § 1983 cases. The Eleventh Circuit had previously uniquely required that a Plaintiff must produce a constitutionally decided case on all fours in order to maintain a § 1983 action involving qualified immunity until the Supreme Court reversed in *Hope v. Pelzer*, 536 U.S. 730 (2002). The Eleventh Circuit previously adopted heightened pleading requirements solely for § 1983 cases which has been superseded by the Supreme Court in *Crawford-el v. Britton*, 523 U.S, 574 (1997) and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). Now the District Court following Eleventh Circuit precedent, albeit inapplicable to state action substantively extending sentences to serve, has applied a statute of limitations procedural bar to prevent inmates from contesting their continued incarceration beyond their sentences to serve which the Supreme Court held to be a continuing constitutional violation in *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

It is submitted that this Petition for Writ of Certiorari presents an opportunity to examine and establish precedent to cabin the self serving "unfettered discretion" permitting the Georgia parole agency to disregard the enacted parole laws and the legislatively mandated Parole Decision Guidelines functioning virtually lawless in secret and in disregard of Ex Post Facto and Due Process. The Georgia parole agency similar to some other state parole agencies is not unique in functioning in secret as a quasi judicial body without any hearings claiming unfettered discretion substantially extending the Petitioner's and similarly situated inmates sentences to serve to serve retroactively beyond their eligibility and likely release under the parole laws and the Parole Decision Guidelines.

I. THE GEORGIA PAROLE AGENCY HAS VIOATED EX POST FACTO BY INCREASING THE PETITIONERS' AND SIMILARLY SITUATED INMATES' SENTENCES TO SERVE TO FORECLOSE CONSIDERATION OF THEIR RELEASE ON PAROLE UNTIL SERVING DE FACTO NINETY PERCENT OF THEIR JUDICIAL SENTENCES THAT IS SUBSTANTIALLY BEYOND THE TIME THAT THEY WOULD LIKELY HAVE BEEN RELEASED ON PAROLE UNDER THE STATUTORY PAROLE LAWS AND THE LEGTISLATIVELY MANDATED PAROLE DECISION GUIDELINES IN EFFECT AT THE TIME OF COMMISSION OF THEIR OFFENSES

The fundamental issue involves the Georgia parole agency's adopting and continuing to enforce pursuant to their self proclaimed "unfettered discretion" an unpublished de facto ninety percent to serve policy thereby substantially extended sentences to serve to de facto ninety percent of judicial sentences before consideration for parole of the Petitioner's as well as all inmates in twenty violent and residential burglary offense categories and then retroactively applying this unpublished policy to significantly increase the sentences to serve to Petitioners' and similarly situated inmates' prior offenses beyond their likely release on parole pursuant to the enacted parole laws providing for their likely release on parole after serving the statutory one-third threshold of their judicial sentences and the months to serve calculated pursuant to the legislatively mandated Parole Decision Guidelines in violation of the United States Constitutional protections of Ex Post Facto.

The precedents of the United States Supreme Court in the cases of *Garner v. Jones*, 529 U.S. 244 (2000) and *California Department of Corrections v. Morales*, 514 U.S. 499 (1995) hold that retroactive actions relating to parole violate the Ex Post Facto prohibitions of the United States Constitution when the practical result of implementation of

actions by a parole agency creates a significant risk of prolonging an inmate's incarceration. In both of these cases the United States Supreme Court ruled that a procedural change in the frequency of review for inmates serving life sentences did not necessarily violate the Ex Post Facto prohibitions. But relevant to the instant case in both of these cases the United States Supreme Court instructed that parole actions which retroactively increase the likelihood or sufficient risk of prolonging inmates' incarcerations would violate the Ex Post Facto prohibitions of the United States Constitution. It is patently obvious that the actions of the Board in applying the de facto ninety percent to serve policy to every inmates' existing sentence to serve significantly increasing the duration of their sentence to serve beyond the statutory parole thresholds for release on parole is retroactively increasing their punishment in violation of Ex Post Facto prohibitions. This was the holding of United States District Court Judge O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, supra, which applied to the individual case of Coleman Jackson and he found that it was not necessary for this "policy" to be a law or regulation, only that its "practical implementation" produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. (A-53).

It is a virtual certainty that this retroactive change increases the likelihood and the sufficient risk that the Petitioners' and all other similar situated inmates' extended sentences to serve in the twenty offender categories will be increased at least from the statutory one-third threshold or the months to serve calculated under the parole decision guidelines to a de facto minimum of ninety percent of judicial sentences to serve. After review of the statistical evidence Judge O'Kelley analyzed that "the Board deviated below the 90% threshold in exactly 10 cases out of 8,664. "Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero" and the previous District Court

decision found that "the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates." (A-55). Judge O'Kelley also found that previous to the implementation of the ninety percent to serve policy the plaintiff Coleman Jackson would likely have been paroled in accordance with the tentative parole month calculated under the parole decision guidelines. (A-59).

In the case of the Petitioners as well as similarly situated inmates in the twenty covered offender categories their parole dates remain unchanged or the Board only made a token adjustments of a few months to avoid the exact mathematical ninety percent. The practical effect is that the Board has adopted and continues to follow a policy of following a de facto ninety percent to serve policy retroactive to offenses committed before its effective date. The representative of the Board testified that the updated number of inmates under the ninety percent to serve policy was at least 10,000 with only 18 being released on parole serving less than ninety percent and these were substantially all prosecutorial deals. (Sullivan Deposition, p 16).

The overriding economic motivation for the Respondents' adoption of the ninety percent to serve policy was the fact that the State of Georgia had applied for to become the recipient of very substantial federal grant funds to build new prisons under the Violent Offenders Incarceration - Truth in Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq.* This Act required that the average time to serve of judicial sentences must be at least 85% for a substantially similar list of violent offenses to the Boards' ninety percent to serve policy in order to qualify for the grant funds to build prisons. Specifically, the grant guidelines pursuant to 42 U.S.C. § 13704 (a) (1) require that to be eligible to receive the grant funds to build prisons that within three years:

> "(A) (i) such State has implemented truth in sentencing laws that require persons convicted of a part I violent crime to serve not less than 85 percent of the sentence imposed...(C)(ii) persons convicted of a part I violent crime on average serve not less than 85% of the maximum prison term allowed under the sentence imposed by the court."

In order to qualify for VOITIS grant funds two legislative Bills had been introduced for passage in the Georgia legislature: one which was enacted as O.C.G.A. § 17-10-6.1 requiring that offenders convicted of the seven most serious violent offense categories serve one hundred percent of their sentences, and another, S.B. 100 (1997), which was defeated required that other violent felons serve the extended time of their sentences. After the legislative attempt failed to enact the extended time to serve law for the other violent offense categories, Georgia turned to the Respondent members of the Board to adopt the ninety percent to serve policy having the practical force of law since they exercise exclusive control of parole eligibility. Georgia specifically spotlighted and cited to the Board's ninety percent to serve policy in its VOITIS application for federal grant funds. The Georgia "1998 Application for Violent Offenders Incarceration and Truth in Sentencing Incentive Grant" evidences that the ninety percent to serve policy was adopted to qualify for VOITIS grant funds. This Georgia application explains in bold type the Board's extended time to serve "policy" changes that were in effect tantamount to law in order for Georgia to be eligible for grant funds that: "The new policy makes it mandatory that these violent offenders serve 90% of their court imposed sentence prior to consideration of parole." A 1998 Supplemental Application even attaches a State Board of Pardons and Paroles' news release and explanation of the Board's "Amended Policy for the Parole of Violent Offenders" in order to quality for tier two VOITIS grant

funds. Georgia was then successful and did receive funds through FY 2000 for a total of $82,236,509 received from the federal government under VOITIS

As a result of Judge O'Kelley's holding their ninety percent to serve policy unconstitutional, the members of the Board adopted a Resolution Amendment, dated September 9, 2002, acknowledging the illegality of the retroactive application of the ninety percent to serve policy and provided for reconsideration of parole for all inmates whose offenses were committed before January 1, 1998 "shall be considered for parole under the Parole Decision Guidelines that do not include the ninety percent policy."

The result of the ostensibly "re-considered sentences under the parole decision guidelines" still averaged for the Petitioners and similarly situated inmates retroactive increases of 5.6 years to serve above parole decision guidelines (O.C.G.A. § 42-9-40) and average of 79.0% of the judicial sentences verses the one-third of judicial sentences statutory threshold for parole (O.C.G.A. § 42-9-45) for the categories of offenses listed in the ninety percent to serve Resolution of December 9, 1997. The substantially extended sentences to serve of 79% of judicial sentences when averaged in with the inmates required to serve 100% of their judicial sentences whose offenses are listed in the seven serious violent offense legislation (O.C.G.A. § 17-10-6.1) will no doubt comfortably average above the 85% requirement to continue to quality for federal grant funds under VOITIS.

Thus the Faustian deal, motivated to receive VOITIS grant funds, traded the freedom of the Petitioners and many, many other inmates to substantially retroactively extend their sentences to serve de facto ninety percent for the receipt by Georgia of over eighty-two million dollars in federal grant funds to build new prisons. It is constitutionally shocking that in order to receive VOITIS federal grant funds, Georgia

did increase its parole threshold for inmates in twenty offender categories from one-third to de facto ninety percent of judicial sentences by the Respondents administratively adopting an unpublished policy having the practical force and effect of law that substantially and retroactively extended as well as continues to extend Petitioner's and similarly situated inmates' sentences by the de facto ninety percent.

In fact neither the Petitioners nor other inmates in the twenty covered offender categories has been considered for parole in accordance with the parole decision guidelines under which they routinely and likely would have formerly been released on parole on their temporary parole months calculated under the parole decision guidelines.. So the Respondents as members of the Board had to and did maintain at least the grant qualifying 85 % average time to serve for Georgia's violent offenders and is continuing to follow the de facto ninety percent policy to substantially extend the Petitioners' and other similarly situated inmates' sentences to serve retroactively.

Weaver v. Graham, 450 U.S. 24, 30 (1981) teaches: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was proscribed when the crime was consummated." (Emphasis supplied). *Weaver* is in a long line of United States Supreme Court cases holding that Ex Post Facto is violated when a state changes the rules to extend the time for consideration for parole and that state acts must give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. (Emphasis supplied) citing *Dobbert v. Flordia*, 432 U.S. 282, 298 (1977); *Kring v. Missouri*, 107 U.S. 221, 229 (1883), 450 U.S. 24, 28-9. *Weaver* is also instructive that, "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the

rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." Citing *Cummings v. Missouri*, 4 Wall. 277, 325 (1865). 450 U.S. 24, note 15. (Emphasis supplied). Also relevant to the instant case, *Weaver* reaffirmed that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to pleas bargain and the judge's calculation of the sentence to be imposed." Citing *Wolf v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974). 450 U.S. 24, 32. *Weaver* concludes: "The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." 450 U.S. 24, 30.

The teachings of *Garner v. Jones*, supra, and *California Department of Corrections v. Morales*, supra, forbid any "practical implementation by the agency charged with exercising discretion", (*Garner* at 255), which created a "sufficient risk" of retroactively increasing an inmates punishment (*Morales* at 509). This "sufficient risk" of retroactively increasing an inmate's punishment arises to a certainty under the Respondents' de facto ninety percent to serve policy which has and continues to retroactive substantially increase Petitioner's punishment beyond his likely incarceration under the enacted parole laws and guidelines in effect at the time of commission of his offense.

II. APPLICATION OF THE UNPUBLISHED NINETY PERCENT TO SERVE POLICY WITHOUT FAIR LEGAL NOTICE TO SUBSTANTIALLY EXTEND SENTENCES TO SERVE BEYOND THE ENACTED PAROLE LAWS AND THE PAROLE DECISION GUIDELINES VIOLATES DUE PROCESS

The District Court's Order and the Eleventh Circuit's Opinion cite *Sultenfuss v. Snow*, 35 F. 3d 1494 (11th Cir. 1994) as foreclosing Georgia inmates from making liberty interest due process claims. However, *Sultenfuss* which was decided on the now overruled search for mandatory state language test that in *Sandin v. Conner*, 515 U.S. 472, 483 (1995) was abandoned by the United States Supreme Court in favor of "real concerns under girding the liberty interest protected by the Due Process Clause."

The actions of the Respondents in retroactively increasing the sentences to serve of the Petitioners and similarly situated inmates without legal fair warning violates Due Process. *Sultenfuss* which is a due process case would not apply to the substantial Ex Post Facto violations by the State Board nor is *Sultenfuss* still the law in light of the Supreme Court's subsequent and now controlling decisions of *Garner v. Jones*, supra, *California Department of Corrections v. Morales*, supra, and *Sandin v. Conner*, supra. The practical realities test of *Garner* and *Morales* to determine a sufficient risk of Ex Post Facto violation and the real concerns under girding the liberty interest protected by the Due Process clause announced in *Sandin* now determine protected liberty interests, not the presence or absence of state mandatory language. The Supreme Court has now held that the "Due Process clause of its own force" may create a protected liberty interest" (*Sandin* at 474) and that the practical realities of creating a sufficient risk of retroactively increasing an inmate's punishment violate Ex Post Facto (*Morales* at 509 and *Garner* at 255). Thus, the controlling Supreme Court law has changed from *Sultenfuss*' state

mandatory language analysis to now look to the practical realities of the state action under *Sandrin* which the Georgia Board has retroactively created as a very substantial and certain retroactive increase in the Petitioner's and similarly situated inmates' sentences to serve. The real concerns of Due Process when viewed against the Ex Post Facto practical realities of what the Georgia Board has done to retroactively and substantially increase the sentences of inmates should at least recognize their liberty interest not to have their Due Process rights continue to be egregiously violated without legal fair warning.

The ninety percent to serve policy was recently declared illegal by Judge Bedford in *Griffin, et al. v. Nix, et al.*, Georgia Superior Court of Fulton County, Civil Action No. 2004-CV-92152 (March 3, 2005) which held the Board's ninety percent to serve policy "illegal and has no force or effect" because it was not filed or published in accordance with the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-3. As the result of the decision the Board has subsequently publicly announced on March 10, 2005 that they have abandoned the ninety percent to serve policy. They also reaffirmed in the same news release their extended sentences to serve policy announcing that, "the vast majority of these inmates can expect to serve most of their sentence in prison." Their continued substantially extended sentences to serve policy has continued the retroactive substantially increased sentences to serve of the Petitioners and approximately 10,000 other similarly situated inmates in the covered offender categories and in not a single case has the Respondents followed the enacted parole laws and the legislatively mandated Parole Decision Guidelines thereby continuing their retroactive substantially increased sentences to serve in violation of Ex Post Facto.

Yet an unpublished de facto ninety percent to serve policy is slavishly continued to be enforced as a de facto law and its effect on the Petitioner and similar situated inmates is

to practically completely foreclose any opportunity for parole until they have served a de facto ninety percent or more of their judicial sentences It gives no legal notice to the public, and is not a policy, rule or regulation pursuant to which the Board may validly enforce their de facto ninety percent to serve policy to extend the duration of inmates' sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution.

It is obvious that the Respondents' actions as members of the Board under color of law in retroactively applying the de facto ninety percent to serve policy has significantly increased the duration of the sentences to serve of the Petitioners and similarly situated inmates beyond the statutory parole thresholds which was and still is being retroactively applying the extended de facto ninety percent policy in violation of the Ex Post Facto prohibitions and Due Process protections of fair warning.

III. STATUTE OF LIMITATIONS DATING FROM INITIAL NOTIFICATION OF THE UNCONSTITUTIONAL NINETY PERCENT TO SERVE POLICY CANNOT BE A BAR TO CONTINUING UNCONSTITUTIONAL VIOLATIONS WHICH CAUSE PRISONERS TO BE INCARCERATED BEYOND THEIR LIKELY RELEASE ON PAROLE BECAUSE OF RETROACTIVE STATE AGENCY PAROLE ACTION SUBSTANTIALLY EXTENDING THEIR SENTENCES TO SERVE IN VIOLATION OF EX POST FACTO AND DUE PROCESS

The Petitioners cannot be barred by the statute of limitations for violations of their civil and constitutional rights which continue every day that they are required to be incarcerated beyond their likely release on parole under the applicable parole laws and the parole decision guidelines in

violation of the Ex Post Facto prohibitions of the United States Constitution.

The District Court's Order found that the statute of limitations began to run when the Plaintiffs were initially notified that they would be considered for parole under the Board's ninety percent to serve policy. The retroactive application of ninety percent to serve policy has been held to be unconstitutional in by a federal court in *Coleman Jackson v. State Board of Pardons and Paroles*, supra, as well as retroactive application abandoned by the Board in their Resolution Amendment of September 9, 2002 and was held illegal by a state court to be "in effective and of no force and effect" in *Griffin, et al. v. Nix, et al.*, Superior Court of Fulton County, Civil Action No. 2004-CV-92152 (March 3, 2005), as well as was announced by the Board of the abandonment of the ninety percent to serve policy on March 10, 2005. Yet following the District Court held which affirmed by the Eleventh Circuit that the initial notice to this declared illegal and unconstitutional ninety percent to serve policy somehow has efficacy and now bars the Petitioners who are continued to be unconstitionally and illegally incarcerated every day until they are considered for parole and finally released from prison following their likely release times in accordance with the enacted parole laws and guidelines. This is the same as not granting an incarcerated prisoner release at the end of a juridical sentence. Parole laws modify judicial sentences to establish the duration of the sentences to serve. No one would seriously contest that a statute of limitations could not prevent an inmate's release after serving of the judicial sentence which would be a continuing constitutional violation. The preventing of an inmate's release on the likely parole date through retroactive increase in punishment is the same continuing constitutional violation.

Each day that the Petitioners have continued Petitioners' unconstitutional incarceration beyond the time

that they should have been released on parole constitutes a new violation of their constitutional rights. The action of the Board is de facto retroactively extending the Petitioners' sentences to serve beyond their likely sentences to serve at the time of commission of their offences and every day thereafter that they are forced to serve is a separate constitutional deprivation. The plight of Petitioners' and similarly situated inmates is reminiscent of the despair of the Man in the Iron Mask in Alexander Dumas novel who was perpetually imprisoned with no hope of relief.

The Respondents as members of the Board on the advice of the Office of the Attorney General acknowledged by Resolution Amendment on September 9, 2002 the unconstitutionally of the retroactively applied ninety percent to serve policy and ostensibly reconsidered all inmates whose sentences to serve were retroactively substantially extended under the ninety percent to serve policy to be reconsidered in accordance with the Parole Decision Guidelines and without regard to the ninety percent to serve policy. These notices of reconsiderations were sent or should have been sent to the Petitioners and similarly situated inmates following this Resolution Amendment within a few months previous to the filing of this action and well within the two year statute of limitations. The Plaintiffs are objecting to the bad faith reconsiderations or lack of reconsideration arising out of the September 9, 2002 Resolution Amendment which de facto continued retroactive substantially increased sentences to serve.

The Eleventh Circuit cited cases of *Brown v. Georgia Board of Pardons and Paroles*, 335 F. 3d 1259 (11th Cir. 2003) and *Lovett v. Ray*, 325 F. 3d 1181 (11th Cir. 2003) all contested the *procedural timing* of the frequency of review of life sentences, but they would not be a bar to the *substantive extending* of the Plaintiffs' sentences to serve which is a continuing violation. The United States Supreme Court in the precedent cases in *Garner v. Jones* and

California Department of Corrections v. Morales, instructed that continuing extended sentences to serve are in violation of Ex Post Facto if the practical result was to likely to extend inmates' sentences to serve under the parole laws and guidelines in effect at the time of the commission of their offenses.

The United States Supreme Court in *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) instructs that constitutional injury causing incarceration continues throughout incarceration and even after the sentence has expired there are "concrete and *continuing injury*" when there are parole restrictions. (Emphasis supplied). Every day is a continuing constitutional violation of being incarcerated beyond the time when they were entitled to be released. Holding inmates beyond their sentences to serve until they likely would have been paroled is analogous to the continual constitutional violation of holding an inmate beyond the limits of a judicial sentence. The flawed reasoning is demonstrated by parody of reasoning that an inmate who was notified that his sentence to serve would be extended beyond the judicial sentence would have not any recourse two years after receiving the constitutionally defective notice even though every day is a continuing violation of the inmate's constitutional rights.

IV. DUE PROCESS AND FEDERAL RULES OF CIVIL PROCEDURE ARE VIOLATED WHEN THE PETITIONER IS DENIED DISCOVERY OF EVIDENCE NECESSARY TO PROVE HIS CASE THAT IS SECRETED EXCLUSIVELY IN THE FILES OF THE GEORGIA PAROL AGENCY AS "CONFIDENTIAL STATE SECRETS"

Petitioners sought discovery to seek an in camera inspection of their parole files as well as statistics and documents from the Board which would have demonstrated that the Board has in fact been following a de facto extended sentence to serve policy retroactively applied to substantially

extend the punishment of all inmates committing violent offenses and residential burglary. It is submitted that the statistics and documents will demonstrate that in not a single inmate in violent offender categories has been considered for release on parole in accordance with the parole laws and the Parole Decision Guidelines as well as demonstrating that every inmate including Petitioners have been retroactively extended de facto almost triple their punishment substantially beyond their likely sentences to serve under the parole laws and the published Parole Decision Guidelines in effect at the time of commission of their offenses.

The Petitioners' complete parole files can only be reached by the District Court granting an *in camera* inspection because of the imprimatur of "confidential state secrets" on Plaintiff's and all inmates' parole files pursuant to O.C.G.A. § 42-9-53 (b). How else could the Petitioner have proven the Respondents' pattern and practice of retroactively substantially extending his sentence to serve except from Board generated statistics as well as documents in his parole file? The Respondents who always secret their flies including the Petitioners' parole file behind O.C.G.A. § 42-9-53 as "confidential state secrets", opposed discovery and an *in camera* inspection, and the trial judge granted the Respondents' Motion for Summary Judgment without granting the *in camera* inspection or any other discovery from the Respondents. The Petitioners also sought statistics to demonstrate the very substantial extended sentences to serve that the Respondents as members of the Board have retroactively exacted increasing the punishment of the Petitioners as well as engaging in a de facto substantially extendin sentences to serve of all similarly situated inmates.

In *WSB-TV v. Lee*, 842 F. 2d 1266, 1269 (11th Cir. 1988) the Eleventh Circuit pointed to three United States Supreme Court cases vacating appellate reversals of district court orders granting summary judgment illuminate both the utility and the limitations of summary procedure. *Celotex*

Corporation v. Catrett, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574 (1986). Their common denominator is the United States Supreme Court's caveat that summary judgment should only be decided upon an adequate record. The Eleventh Circuit in *WSB-TV* held that summary Judgment was not proper when the adverse party did not have an adequate opportunity for discovery. In *Celotex*, the Supreme Court held that "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" but only "after adequate time for discovery." 477 U.S. at 322-323 (Emphasis supplied). And the District Court even referred to *Kerr v. United States District Court for the Northern District of Georgia*, 426 U.S. 394, 405 (1976) emphasizing "that an in camera review of documents 'is a relatively costless and eminently worthwhile method' of ensuring a balance between a plaintiff's need for documents and the government entity's claim of privilege."

The Respondents cannot cloak their actions in secrecy to deny a litigant access to relevant information and documents. The courts have always had the power to disregard an agency's self-designation of their privilege to withhold relevant documents which are ordered by the court to be produced and the agency's designation or even the legislative designation is not binding on the court. A trial court should not permit control over the relevant evidence to be left to the discretion of an agency designation of privilege or even to the President of the United States maintaining that executive documents are privileged. See *Nader v. Butz*, 60 FRD 381 (D.C.D.C. 1973) and its Watergate progeny.

It would be a denial of fair play and substantial justice to permit the Respondents to avoid a serious constitutional deficiency in their administration of paroles in

the State of Georgia by maintaining that its files are confidential and therefore can not provide the proof necessary to demonstrate the unconstitutional conduct and its irreparable injury to Petitoiner and other similarly situated inmates who are entitled to be released under the controlling parole laws and Parole Decision Guidelines in effect at the time of commission of their alleged offenses. The claim of secrecy of the files and even the votes of the members in granting or denying parole when coupled with their self-serving claim of unfettered discretion creates a very unusual confluence of secret unchecked power. It is submitted the underlying instant case, which brings into focus the Respondents attempt to enforce an unofficial and unpublished policy that disregards the controlling parole laws, arises out of this secrecy milieu. The recent revelations of the "Board" making decisions by only staff or by one member acting in violation of the Georgia parole laws and even the Board's rules and regulations are symptomatic of the infectious secrecy that pervades the Boards proceedings and its self- proclaimed "unfettered discretion." It is time that this Star Chamber secrecy should be brought into the twentieth-first century to allow relevant discovery and documents to be seen in the light of the Federal Rules.

It is a fundamental violation of Due Process to deny Petitioners discovery of the only possible evidence exclusively in their files to support their cause of action and then maintain that they are entitled to summary judgment because the Petitioners cannot produce evidence which they stonewalled. Such a catch 22 result is legally absurd.

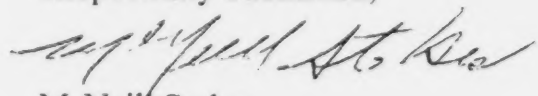
CONCLUSION

The retroactive application of the de facto ninety percent to serve policy substantially extending sentences to serve beyond the time that Petitioners and similarly situated inmates would likely have been released on parole violated the Ex Post Facto and Due Process protections of the United

States Constitution. This case involves one of the most massive civil rights abuses of the latter part of the twentieth century encompassing over ten thousand inmates including Petitioner who have had their sentences to serve retroactively almost tripled and have been de facto foreclosed from parole under the enacted parole laws and mandated guidelines.

The Georgia Board members may be the only exception in the criminal justice system without any of the traditional checks and balances of the republic and even secreting the documents on which they base their decisions without any hearings in Star Chamber secrecy. The Board is constitutionally independent of the executive branch. Claiming "unfettered discretion" they refuse to follow the enacted parole laws and they do not follow the legislatively mandated Parole Decision Guidelines maintaining that they can and do in every case depart from the enacted parole laws and guidelines to retroactively de facto almost triple sentences to serve in the twenty categories. There may not be any supervision either by the courts which continue ducking the issues letting the Georgia Board have their self proclaimed unfettered discretion uniquely unchecked by our constitutional protections. Madison cautioned that "temporary deviations from fundamental principle are more or less dangerous because once the deviation is made it becomes the rule."

Respectfully Submitted,



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